2006

Daniel Grappendorf, et. al., v. City of Pleasant Grove : Brief of Appellee

Utah Court of Appeals

Peter Stirba, Meb W. Anderson; Stirba & Associates; attorneys for appellee.
Edward P. Moriarity, Bradley L. Booke, Robert D. Strieper; Moriarity, Badaruddin & Booke; attorneys for appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

DANIEL GRAPPENDORF, *et. al.*,	:	
Plaintiffs/Appellees,	:	Supreme Court Case No. 20060461-SC
v.	:	District Court Case No. 030404102
CITY OF PLEASANT GROVE,	:	
Defendant/Appellant.	:	

Appeal from the Fourth Judicial District Court
in and for Utah County, State of Utah,
The Honorable James R. Taylor

BRIEF OF APPELLEE

Edward Moriarity
Bradley Booke
Robert D. Strieper
MORIARITY, BADARUDDIN, & BOOKE
341 South Main Street, Suite 406
Salt Lake City, Utah 84111
(801)326-8090
Attorneys for Appellant-Plaintiff

Peter Stirba
Meb W. Anderson
STIRBA & ASSOCIATES
215 South State Street, Suite 750
Salt Lake City, Utah 84111
(801) 364-8300
Attorneys for Appellee-Defendant

- ORAL ARGUMENT REQUESTED -

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Salt Lake City, Utah 84111
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Attorneys for Appellant-Plaintiff

Peter Stirba
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STIRBA & ASSOCIATES
215 South State Street, Suite 750
Salt Lake City, Utah 84111
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JURISDICTIONAL STATEMENT

Plaintiffs (the "Grappendorfs") are appealing orders of dismissal pursuant to Pleasant Grove City's (the "City" or "Pleasant Grove") Motion for Summary Judgment issued by the district court on March 29, 2005, and May 17, 2005. (Record on Appeal ["R."] at 1034-1056, and 1063-1069). Pursuant to a May 19, 2006 Order, the appeal was transferred by the Utah Supreme Court to the Court of Appeals pursuant to Utah Code Ann. § 78-2a-3(2)(j). However, at the request of the City of Pleasant Grove ("Pleasant Grove" or the "City") this Court retained this case pursuant to a June 14, 2006 Order. Thus, this Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2.

APPELLATE ISSUES

A. Given the Undisputed Facts of this Case as Found Applicable by the Trial Court, Did the Trial Court Err in Granting the City's Motion for Summary Judgment Pursuant to the Utah Governmental Immunity Act's Natural Condition Exception?

B. Did the Governmental Immunity Act, as Applied to the Grappendorfs, Violate the Open Courts Clause of the Utah Constitution?

C. Did the Governmental Immunity Act, as Applied, Violate the Grappendorfs' Right under the Utah Constitution to Recover Damages for Injuries Resulting in Death?

D. Did the Governmental Immunity Act, as Applied, Violate the Grappendorfs' Petition Rights under the Utah Constitution.

STATEMENT OF THE CASE

Pleasant Grove is a municipality in Utah and owns and operates a recreation venue called "Discovery Park Baseball Diamonds" or "Manila Field." [R. at 1053]. "To accommodate baseball and softball game play, Pleasant Grove purchased and used a moveable pitching mound." *Id.* "This mound had been chained to a fence by a Pleasant Grove employee, and, in June of 2002 a forceful wind gust [a microburst] lifted the mound, causing it to strike Daniel A. Grappendorf who sustained fatal injuries." *Id.*

On September 18, 2003 the Grappendorfs engaged in their constitutionally protected right to petition for redress of their grievances by filing the instant action against Pleasant Grove among others. Brief of the Appellant at page 6-7. Pleasant Grove moved for summary judgment from suit based on the Utah Governmental Immunity Act (the "Act"), specifically the natural condition exception and the infliction of mental anguish exception to general waivers of governmental immunity. After standard briefing, and supplemental briefing, on February 28, 2005 the trial court heard oral argument. On March 29, 2005 the trial court issued a Memorandum Decision granting Pleasant Grove's Motion for Summary Judgment. [R. at 1034-1056]. The trial court held that "under the Utah Governmental Immunity Act as in effect in 2002, Defendant Pleasant Grove City is entitled to immunity from suit for negligence in this case because, by operation of U.C.A. § 63-30-10(11) [the natural condition exception to waiver of governmental immunity], the city's immunity from negligence is not waived." [R. at 1045-46].

Addressing the Grappendorfs' claim that the Act was unconstitutional as applied to them the trial court held that: "this court cannot find that the Utah Governmental Immunity Act as amended in 1987 unconstitutionally abrogated a pre-existing and constitutionally protected cause of action for negligence against a municipality or its employee in the operation or maintenance of a public park." [R. at 1036]. "Because there is no finding that the legislature impermissibly abrogated a cause of action, . . . the immunity statute must be applied . . . ." *Id.*

In a Supplemental Memorandum Decision [R. at 1063-1069], the trial court further held that in regards to the initial Memorandum Decision: "In short, Pleasant Grove's operation and maintenance of Manila Field is a governmental function within the meaning of the Act, and the Act specifically waives immunity from suit for the negligence of Pleasant Grove." [R. at 1067]. Further, the trial court held that "the statutory language [of the Act] specifically retains immunity for negligence-based claims for emotional distress." *Id.* "Therefore, under the Utah Governmental Immunity Act, U.C.A. § 63-30-1 et seq., as in effect in 2002, Pleasant Grove is immune from suit by Plaintiffs' for their claims for emotional distress." *Id.* at 1065. After settlement or dismissal removed any remaining defendants from the instant case, the Grappendorfs brought this appeal.

ADDITIONAL STATEMENT OF FACTS

1. Pleasant Grove is a city in Utah, which owns and operates a recreational

city park and ball field complex called "Discovery Park Baseball Diamonds" or "Manila Field." *See* Brief of Appellant; [R. 0346, 1053].

2. To accommodate both baseball and softball play at the Manila Fields,[1] Pleasant Grove purchased and used a moveable pitching mound made of plywood and covered with artificial turf. Brief of Appellant at page 9.

3. At the time of the relevant microburst wind event this mound had been chained to a fence by a Pleasant Grove employee. [R. 1053].

4. The pitching mound was chained to the fence by circling the chain through a nylon strap or handle on the pitching mound. [R. at 258-59]. The nylon strap was connected to the top edge of the pitching mound by four one-inch screws. Brief of Appellant at page 9.

5. The sole purpose for chaining the mound to the fence was to "keep 'somebody from being injured while jumping bikes.'" [R. at 1046 (marks omitted)].

6. On June 21, 2002, thirteen-year-old Daniel Grappendorf went to watch his sister play softball at Manila Field. Brief of Appellant at page 9.

7. At approximately 7:55 p.m., an unexpected and violent summer microburst wind gust lifted the mound up and pulled it away from the chain-link fence, breaking the nylon strap and causing the mound to move through the air. *See* Brief of Appellant at page 9; [R. at 239, 242, 257, 512 (Appellants' counsel's admission that gust of wind was

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[1]Softball is played without an elevated pitching mound.

a microburst)].

8. Propelled by the microburst gust of wind, the pitching mound struck and killed Daniel Grappendorf. Brief of Appellant at page 9; [R. at 1053].

9. The trial court granted Pleasant Grove's Motion for Summary Judgment, finding that the microburst gust of wind was the cause of Daniel Grappendorf's death, thereby finding the undisputed facts of the case to fall within the "natural condition" exception to the Governmental Immunity Act, and finding that the Act was constitutional as applied to the Grappendorfs in light of Article I § 11 (Open Courts Clause) and Article XVI § 5 (Wrongful Death Guarantee) of the Utah Constitution. Brief of Appellant at page 10.

10. On February 28, 2005 the trial court heard brief oral argument regarding the Grappendorfs' claim that the Act was unconstitutional as applied to them because it violated their rights under Article I § 1, (Petition Clause) of the Utah Constitution. [R. at 1150 pages 13 and 29]. The trial court did not address the issue in the Memorandum Decision. Brief of Appellant at page 10. However, the trial court stated at oral argument with regards to the Petition Clause claim: "you can sue everybody" and "[t]hat's why I come to work everyday." [R. at 1150 pages 13 and 29].

SUMMARY OF ARGUMENT

The district court correctly applied the Utah Governmental Immunity Act's "natural condition" exception to waiver of immunity to the undisputed facts of this case. The Utah Supreme Court held in *Blackner v. State, Dept. of Transp.*, 48 P.3d 949, 2002 UT 44, that when a plaintiff's injury "arises out of" or in connection with, or results from a natural condition on publically owned or controlled lands, governmental immunity is retained with respect to any action to recover for injuries proximately caused by a government employee's negligence. The "arises out of" language requires only that there be some causal nexus between the risk of the natural condition and the resulting injury. *Id.* at ¶ 15.

Here, the risk that the pitching mound at the publically owned and operated Manila field would become airborne and strike and kill Daniel Grappendorf "arose out of" the natural condition of the microburst of wind. "But for" the natural condition of the microburst gust of wind the pitching mound would have absolutely remained on the ground. Accordingly, the City is immune from suit on these undisputed facts.

This application of the Act does not violate the Open Courts Clause of the Utah Constitution. Furthermore, there are no other constitutional infirmities with Judge Taylor's application of the Utah Governmental Immunity Act, nor its application in this case. Judge Taylor's application of the Act in this case does not violate the wrongful death cause of action guarantee of the Utah Constitution. The Utah Governmental

Immunity Act allows immunity from suit for all government entities for any injury which results from the exercise of a government function. The Grappendorfs claim that the definition of government function is overbroad and bars them from the courts, even though the Grappendorfs have successfully settled this lawsuit as to at least one defendant. Here, the municipal operation of a non-proprietary baseball/softball complex and city park is entirely a government function. At no time in the history of Utah law would the law and its application have been any different to these undisputed facts. Given Judge Taylor's thorough and correct application of the Act, the Grappendorfs have suffered no violation of the Open Courts Clause of the Utah Constitution.

Finally, Judge Taylor's application of the Act in this case does not violate the Petition Clause. The Grappendorfs filed this civil case and have petitioned the court for grievances. This is evidenced by the fact that the Appellants now have this case on appeal. The right to petition the courts does not amount to the right to an absolute outcome. The right to petition the courts as guaranteed in the Utah Constitution guarantees only the absolute right to file a complaint, which the Grappendorfs have done.

ARGUMENT

I. Standard of Appellate Review.

The appropriate standards of appellate review applicable in this case were stated precisely by this Court in *Blackner v. State, Dept. of Transp.*, 48 P.3d 949, 2002 UT 44. In *Blackner*, this Court held that:

> Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. When reviewing whether the trial court properly granted summary judgment, we accord the trial court's legal conclusions no deference and review those conclusions for correctness. Furthermore, a trial court's interpretation of a statute is a question of law that we review for correctness.

Id. at ¶ 8 (internal marks and citations omitted).

II. The Appellants' Factual Assertions on Appeal are not Supported by the Record nor by Competent Evidence.

In the Grappendorfs' Statements of Fact they make a number of factual assertions which are unsupported by record evidence or admissible evidence.

For example, the Grappendorfs claim that storing the mound on its side was "contrary to the manufacturer's express, written safety instructions, which required the pitching mound to be stored flat on the floor or on its side 'flush against a wall.'" Brief of Appellant at page 9. There is no factual evidence in the record which indicates that Pleasant Grove stored the mound "contrary to the manufacturer's express, written safety instructions." In fact, there were no "safety instructions" with the mound. The record does indicate that the mound had storage instructions to avoid warping of the mound and

ensuring the portable pitching mound had a longer use time. The only storage instructions in the record indicate that:

> Storage of all mounds is crucial to longer service time. The warranty becomes void if the product is not stored properly. Do not store any products on top of the mounds of the mound is lying flat on the ground. If the mounds are stored on their side, make certain they are set flush against the wall. Warpage will occur if other products are stacked on top of the mound and if the mound is not set flush against the wall. Vacuum out the Astro Turf before putting the mound in storage to add to service time of the mound.

[R. at 388]. Clearly these storage instructions are not "safety instructions." In fact, Pleasant Grove was storing the mound on its side as these storage instructions indicate they should. Whether the mound was flush against a wall or chain link fence is of no moment here, as the storage instructions only indicate this should be done to avoid warping of the mound, not as any type of safety precaution.

Also, the Grappendorfs cite to inadmissible evidence which they attached as an exhibit to their Response in Opposition to Pleasant Grove's Motion for Summary Judgment. The trial court indicated these exhibits were improper and did not consider this evidence. In footnote 25 of the Memorandum Decision the trial court states:

> Exhibit 2 is not an affidavit of Paul Schoonover and is replete with inadmissible hearsay. . . . This exhibit, filed without foundation, may not be considered by this court in any event. U.R.C.P. 12 allows the court to consider "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. . . ." This and the Plaintiff's similar exhibits appear to be transcripts of telephone conversations and are not any of those items listed in Rule 12.

[R. at 1046]. The Appellants' Brief repeatedly cites to the inadmissible evidence which

the trial court did not use, as it is not allowed by the Utah Rules of Civil Procedure. *See* Brief of Appellants at page 9, ¶ 3 (citing to Exhibit 2, Paul Schoonover Memo), and ¶ 4 (citing to Detective Thornton Memo). This Court cannot consider these inadmissible documents.[2]

The Grappendorfs now cite to these exhibits, and other non-existent facts, as if they are properly in the record. *See e.g.*, Brief of Appellant at page 9, ¶ 3 (safety instructions), ¶ 4 (not to secure the pitching mound to a fence), and ¶ 8 (decapitated). References to facts which do not exist in the record, or are improperly in the record, should not be considered by this Court.

III. Judge Taylor Correctly Applied the Utah Governmental Immunity Act's Natural Condition Exception to the Undisputed Facts of this Case.

"[T]o determine whether a governmental entity is immune from suit under the Act, we apply a three-part test, which assesses (1) whether the activity undertaken is a governmental function; (2) whether governmental immunity was waived for the particular activity; and (3) whether there is an exception to that waiver." *Blackner*, 2002 UT 44 at ¶ 10.

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[2]Although these facts are unsupportable, even if they were record evidence and were considered by this Court to constitute negligent storage, it would not matter as the trial court correctly found at footnote 4 of the Memorandum Decision, under the express exceptions to waivers of governmental immunity that are applicable to this case, "the court may assume that Pleasant Grove was negligent." [R. at 1053].

A. Government Function.

The Act defines a 'governmental function' as:

> 'Governmental function' means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

Utah Code Ann. § 63-30-2(4)(a). Utah Courts have interpreted this definition broadly. *Laney v Fairview City*, 2002 UT 79, ¶ 4, 57 P.3d 1007, 1011 (Utah 2002) (holding that the term governmental function is broadly defined in section 63-30-2(4)(a), and by virtue of that broad definition, the statute cloaks governmental entities with immunity for a wide range of activities.).

While the Grappendorfs now dispute on appeal whether the maintenance of the Manila Fields by Pleasant Grove is a government function, the trial court properly stated the Grappendorfs' position in the record when it stated that: "It is undisputed that Pleasant Grove is a city and that the maintenance and operation of Manila Field is a 'government function'. . . ." [R. at 1051]. Further, the Grappendorfs only dispute whether Pleasant Grove is engaging in a government function under the constitutional analysis which is addressed below. The Grappendorfs leave any discussion of whether Pleasant Grove is engaged in a government function out of their analysis of whether the natural condition exception to a waiver of government immunity applies. This is likely because

of the sweeping language in the definition of "government function" of the Utah Governmental Immunity Act in effect in 2002 at the time of this tragic accident.[3] Further, in their Memorandum in Support of their Motion for Summary Judgment, the City affirmatively stated that: "The City owns and operates the Discovery Park Baseball Diamonds (the "Diamonds") which are sometimes referred to as Manila Field." [R. at 0259]. The Grappendorfs did not dispute this fact at all. [R. at 0515 (stating that "Plaintiffs do not generally disagree with any of Defendants facts[.]")]. Simply, it cannot be disputed that Pleasant Grove's maintenance of the Manila Fields was anything other than a government function.

B. Waiver of Immunity.

The trial court assumed Pleasant Grove was negligent.[4] If Pleasant Grove were negligent in their storage of the pitching mound, immunity from suit would be waived under Utah Code Ann. § 63-30-10.

C. Exception to Immunity Waiver.

The Grappendorfs allege on appeal that the trial court erred in determining

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[3] Effective July 1, 2004, the relevant provision of the Act was reenacted as Utah Code § 63-30d-301. However, "[i]t is the intent of the legislature that: (1) injuries alleged to be caused by a governmental entity that occurred before July 1, 2004 be governed by the provisions of Title 63, Chapter 30 . . .". Section 48 of Laws 2004, c. 267. Thus, Title 63, Chapter 30 is cited in this memorandum.

[4]Pleasant Grove would submit that the clear and undisputed facts of this case indicate that they were not negligent in their storage of the pitching mound. However, as discussed herein, this Court need not decide the negligence issue to dispose of this case because as the trial court did, even where negligence is assumed, immunity applies.

that the natural condition exception to the waiver of immunity applied to the undisputed facts. The Act provides an exception to the waiver of governmental immunity where the Grappendorfs' alleged injury either "arises out of, in connection with, or results from: . . . (11) any natural condition on publicly owned or controlled lands. . . ." Utah Code Ann. § 63-30-10(11); *see Blackner*, 2002 UT 44, ¶ 11. This language evidences the clear intent of the legislature of the State of Utah.

The *Blackner* court explained that:

> When interpreting statutes, we determine the statute's meaning by first looking to the statute's plain language, and give effect to the plain language unless the language is ambiguous. The statute's language plainly states that all governmental entities are immune from suit for a government employee's negligence when the plaintiff's injury arose from, was connected with, or resulted from a "natural condition on publicly owned or controlled lands." Utah Code Ann. § 63-30-10(11) (1997).

Id. at ¶ 12 (citations omitted).[5]

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[5]A thorough recitation of this Court's review of the Utah Government Immunity Act's exceptions to waiver of government immunity is provided in *Lyon v. Burton*, 5 P.3d 616, 622, 2000 UT 19 ¶ 17, where this Court states:

> In construing these subsections, we apply long-standing rules of statutory construction. This court's primary objective in construing enactments is to give effect to the legislature's intent. The plain language of a statute is generally the best indication of that intent. Therefore, where the statutory language is plain and unambiguous, we do not look beyond the language's plain meaning to divine legislative intent. The plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters. Furthermore, where possible we construe statutory provisions so as to give full effect to all their terms. Most pertinent here is the rule that a statute dealing specifically with a particular issue prevails over a more general statute that arguably also deals with the same issue.

Id. (internal marks, citations, and quotations omitted).

In *Blackner*, Mr. Blackner was on his way up Little Cottonwood Canyon when he was stopped in a known avalanche area because crews were removing snow off the road from a prior avalanche. *Id.* at ¶ 4. While Mr. Blackner was stopped in the known avalanche area, another avalanche came down the mountain and injured Mr. Blackner. *Id.* at ¶ 6. Mr. Blackner sued the Utah Department of Transportation (UDOT) and Alta City, alleging that their negligence in managing the first avalanche and stopping him in a known avalanche area resulted in his injuries. *Id.* at ¶ 7. The only issue decided by the Utah Supreme Court in *Blackner* was whether the "natural condition" exception shielded UDOT and Alta City from liability for the alleged negligent acts or omissions of governmental employees. *Id.* at ¶ 10.

Similar to *Blackner*, the Grappendorfs claim on appeal that it was the negligence of Pleasant Grove that was the proximate cause of their injuries and the death of Daniel Grappendorf. For example, the Grappendorfs claim that "but for" the negligence of Pleasant Grove the microburst wind gust "would not have caused the pitching mound to become airborne nor would the pitching mound have caused Daniel Grappendorf's death." Brief of Appellant at page 13. The Grappendorfs also claim that "the governmental negligence - - - disregarding express manufacturer's instructions and placing an artificial pitching mound in a position that was contrary to the safe procedure

required by the manufacturer - - - created the danger."[6] *Id.* Mr. Blackner made the same argument when he claimed that "the negligence of UDOT and Alta was the proximate cause of his injuries instead of that avalanche." *Blackner*, 2002 UT 44 at ¶ 13. Just like this Court said in *Blackner*, here the Grappendorfs' argument "either miscomprehends or misapplies the plain language of the Act." *Id.*

As the *Blackner* court explained, Mr. Blackner misunderstood the plain language of the Act, and here so have the Grappendorfs, because:

> The Act unequivocally provides that when a plaintiff's injury either arises out of or in connection with, or results from a natural condition on publicly owned or controlled lands, governmental immunity is retained with respect to any action to recover for injuries proximately caused by a government employee's negligence. The application of the "natural condition" exception to the waiver of governmental immunity does not hinge on whether the "natural condition" in any way "proximately caused" the plaintiff's injuries.
> In the instant case, even assuming that the actions of Payne and Medara were negligent and proximately caused Blackner's injuries, UDOT and Alta are immune from suit to recover for those injuries because Blackner's injuries arose out of a natural condition on publicly owned or controlled land.

Id. at ¶¶ 13-14.

The *Blackner* court then goes on to explain that:

> Under the statute, the "arise out of" language requires only that there be some causal nexus between the risk and the resulting injury. In other words, but for the [natural condition], Blackner would not have suffered

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[6]As discussed in section I of this Brief, these arguments are simply not supported by the record. Nowhere in the manufacturer's storage instructions are danger or safety issues discussed. *See* [R. at 387-89].

> injury. . . . Blackner's injuries arose out of a natural condition existing on publicly owned or controlled land. Accordingly, the trial court correctly concluded that UDOT and Alta are immune from Blackner's suit because the "natural condition" exception to the waiver of governmental immunity applies to Blackner's injuries regardless of whether Payne and Medara [the government employees] were negligent.

Id. at ¶¶ 15-16. The plain language of the Act is clear, and this Court's strict interpretation of that plain language is also clearly and unequivocally evidenced in *Blackner*.

Blackner is not the only case where the plain language of the Act has been clearly evidenced. For example in *Tiede v. State*, 915 P.2d 500 (Utah 1996), this Court held that the plain language of section 63-30-10 immunizes a government entity against a negligence action when the injury arises out of one of the exceptions listed in section 63-30-10. *Id.* at 502. "The definition section of the Act states that "injury means death, among other things." *Id.* (citing § 63-30-2(5)) (marks omitted). "Thus a governmental entity is immune from a negligence action for a death arising out of an [section 63-30-10 exception to waiver of government immunity]." *Id.*

Simply, if a natural condition occurs on publically owned land and is a "but for" cause of the plaintiffs injuries, the governmental entity responsible for that land will not be liable for any injuries resulting from the natural condition, even if there was negligence by the government entity which contributed to the accident. Here, it is beyond reason to suggest, and the Grappendorfs do not so suggest, that "but for" the microburst gust of wind the injury to Daniel Grappendorf would not have occurred. Even if Pleasant

Grove had left what the Grappendorfs claim was a 400 pound pitching mound simply half propped against the fence without any chain at all, only a microburst of wind could get the pitching mound airborne and lead to the tragic chain of events that did in fact unfold in this case. In fact, it is quite possible that a microburst of wind could have even picked the pitching mound up from the ground and caused these same injuries to a person even if the pitching mound were laying flat on the ground during a baseball game or during routine storage.[7]

The Grappendorfs also argue in their Appellant Brief that *Blackner* does not apply to this case because "in *Blackner* the 'natural condition' preceded the governmental negligence and was the cause of the plaintiff's injury." Brief of Appellant at page 12. The Grappendorfs claim that because their were two avalanches in *Blackner*, one that caused the road blockage and one that hurt Mr. Blackner, the *Blackner* court must have

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[7]A microburst of wind is a major natural condition/disaster. The Grappendorfs attempt to trivialize the gust of wind which picked up the pitching mound. However, this was a major wind event capable of unknown damage and disastrous consequences. *See* [R. at 315, 320]; s*ee e.g.*, *Friends of Gateway v. Slater*, 257 F.3d 74, 76 (2nd Cir. 2001) (a microburst is a small but powerful rush of cold air that spreads out as it reaches the ground and can cause the wind to shift 180 degrees several times within the space of a few miles); *Fajardo Shopping Center, S.E. v. Sun Alliance Ins. Co. of Puerto*, 167 F.3d 1 at fn 12 (1st Cir. 1999) (microburst winds can generate damaging horizontal winds of up to 168 mph); *McAleer v. Smith*, 860 F.Supp. 924, 941-42 (D. R.I. 1994) (a microburst is an act of God or a natural disaster similar to a localized hurricane which can produce destructive force and extremely unfortunate results); *Caldwell v. Let The Good Times Roll Festival*, 717 So.2d 1263, 1269-72 (La. Ct. App. 1998) (a microburst gust of wind, which is a possibility with any storm, is not reasonably foreseeable and is an act of God or force *majeure* sufficient to relieve the city of liability).

meant that the first avalanche "and not the government employee - - was the cause of the plaintiff's injuries." Brief of Appellant at page 12. This argument misses the mark on a number of levels. First, Blackner was an anomaly where there were two separate natural conditions, and both avalanches were "but for" causes of Mr. Blackner's harm. "But for" the first avalanche Mr. Blackner does not stop and is not hurt. "But for" the negligence of the UDOT employees, Mr. Blackner does not get hurt. Also, "but for" the second avalanche cascading down the mountain, Mr. Blackner does not get hurt. In *Blackner*, and in this case, the facts clearly evidence that the injuries "arose out of" a natural condition.

It belies logic to accept the Grappendorfs' argument that first a natural condition must occur, followed by government negligence in order for the natural condition exception to apply. This is not what the Act says, and it is certainly not what *Blackner* stands for. Furthermore, the government's alleged negligence is just simply not applicable to decisions of governmental immunity under section 63-30-10's waiver exceptions. For example, this Court has held that:

> In determining whether an injury falls within this exception to section 63-30-10's general waiver of immunity for negligence claims, we have rejected attempts to evade the statutory categories by recharacterizing the supposed cause of the injury. Instead, we have focused on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or the type of negligence alleged.

Tiede, 915 P.2d at 502 (citing cases) (marks omitted); *see Taylor on Behalf of Taylor v. Ogden City School Dist.*, 927 P.2d 159, (Utah 1996) (holding that conduct of government

employees should "play[] no part in the court's analysis or conclusions that . . . the governmental entity was immune from suit.").

Furthermore, the Grappendorfs present two hypothetical arguments (labeled "simple examples") regarding the natural conditions of gravity and predictable wind conditions. These arguments are also off the mark. First, the Grappendorfs claim that if a Pleasant Grove employee secured the pitching mound above the full bleachers at a baseball game with kite string, and the mound naturally broke the string and fell because of the natural condition of gravity,[8] injuring the spectators, that Pleasant Grove would be immune from suit. If this odd scenario were to ever unfold, the employee who placed a pitching mound above a spectator seating area would be guilty of malice or malicious conduct. In 2002 the Utah Government Immunity Act specifically stated that where an employee acted with malice they could be personally liable. *See* Utah Code Ann. 63-30-4(4)(a) (2003). This just was not the case here and this "simple example" is wholly

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[8]In cases like *Blackner*, *Apffel v. Huddleston*, 50 F.Supp.2d 1129 (D. Utah 1999) (holding that the dangerous condition that resulted in the death of plaintiff was the naturally occurring sandstone cliffs, rather than the act of planning a party in their vicinity), and this case, the natural conditions are not the types of natural conditions from which a government entity could affirmatively protect the public. If government entities were forced to engage in protecting the public from natural conditions like avalanches, sandstone cliffs, and microburst winds it would result in enormous monetary and social cost. When possible, government entities do all they can to protect the public from these severe natural conditions. However, the Utah Legislature has recognized that tragic circumstances like those in *Blackner*, *Apffel*, and this case can happen as a result of severe, unpredictable, unexpected, and sometimes unmanageable natural conditions and thus, government entities like the City are immune from liability arising from these types of natural conditions under the Act.

misplaced.

The Grappendorfs second "simple example" involves negligent renovation of a state capital building and misses the mark completely. The natural condition exception would not apply at all in that "simple example," because the Act as written in 2002 specifically states that there is an exception to the waiver of immunity for "a latent dangerous or latent defective condition of any public building, structure, . . . or other public improvement." Utah Code Ann. § 63-30-10(17) (2003).

Simply put, the legislature has determined that certain situations and occurrences allow for immunity from suit for government entities even if the alleged injuries is proximately caused by the negligent act or omission of a government employee. A natural condition is absolutely one of these situations.[9] The microburst wind gust on June 21, 2002 was a natural condition which was severe enough to pick up, rip from a chain, and move what the Grappendorfs claim is an approximately 400 pound pitching mound. "But for" the unpredictably severe and unfortunately tragic microburst wind gust on June 21, 2002, the Grappendorfs would not have suffered the injury complained of in

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[9]The Grappendorfs also brought claims for negligent infliction of emotional distress against the City. However, the Act states that: "Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from . . . (2) . . . infliction of mental anguish . . .". Utah Code Ann. § 63-30-10(2)(1997). Accordingly, the City is immune from Plaintiffs' claims for negligent infliction of emotional distress under the Act. Furthermore, the Grappendorfs did not raise these issues in the Brief of Appellant and thus have effectively abandoned these claims on appeal.

this lawsuit. The Grappendorfs' alleged injuries and the tragic death of Daniel Grappendorf absolutely and unequivocally arose from a natural condition. Thus, the City is immune from this lawsuit under the Utah Governmental Immunity Act.

Accordingly, Judge Taylor was correct in granting Pleasant Grove summary judgment pursuant to the natural condition exception to the waiver of government immunity in light of the plain language of Utah Code Ann. § 63-30-10(11) and the Utah Supreme Court's interpretation of the natural condition exception in *Blackner v. State, Dept. of Transp.*, 48 P.3d 949, 2002 UT 44.

IV. As Applied in this Case the Utah Governmental Immunity Act Does Not Violate the Open Courts Clause of the Utah Constitution.

The Grappendorfs did not make any constitutional arguments in their Response in Opposition to Pleasant Grove City's Motion for Summary Judgment.[10] *See*

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[10]Because the Grappendorfs presented completely new legal theories in their supplemental briefing, it was error for the trial court to consider it and this Court should not consider the Grappendorfs' Constitutional arguments on *de novo* review. *See* [R. at 1054 (stating that the Supplemental Memorandum "goes far beyond correcting any characterization of the law that Pleasant Grove has put forward.")]. As this Court has stated:

> While Rule 15(a) U.R.C.P. provides that leave to amend 'shall be freely given when justice so requires,' the liberality of the rule is not without limit, particularly when nothing new or of substance is contained in the proposed amendment. The permitting of amendments to pleadings rests in the sound discretion of the trial court and we find no abuse of that discretion in this case. Furthermore, an unverified amendment of a pleading should not be allowed to defeat a motion for summary judgment if the amendment does not effect any substantial change in the issues as they were originally formulated in the pleadings.

Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624, 637 (Utah 1960).

[R. at 497-518 generally]. Rather, the Grappendorfs waited some two months until the eve of the Motion for Summary Judgment hearing before they filed a Motion to Amend their Response in Opposition to Defendant Pleasant Grove City's Motion for Summary Judgment. *See* [R. at 881-892]. The trial court granted the Grappendorfs' Motion to Amend and treated their pleading, together with the City's Motion to Strike, as supplemental briefing.

The Grappendorfs present two arguments as to why the district court's decision violates the Open Courts Clause. First, the Grappendorfs argue that the district court "interprets *Blackner* in a manner that contravenes the Open Courts Clause." Brief of Appellant at 16. For the reasons argued in the above section, and those argued in this section, this argument is unavailing.[11] Contrary to the Grappendorfs claim, the district court did not "misuse" *Blackner* in contravention of the Open Courts Clause, and did not expand under any circumstances the application of the natural condition exception. It is undisputed that the injury to the Grappendorfs arose out of a natural condition.

This Court has stated that, "[a]lthough the open courts clause protects both substantive and procedural rights, the clause is not an absolute guarantee of all substantive rights." *Tindley v. Salt Lake City School Dist.*, 116 P.3d 295, 2005 UT 30 at ¶ 17. The Open Courts Clause "applies only to legislation which "abrogates a cause of

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[11]The Grappendorfs settled this lawsuit as to one defendant. That is prima facie evidence that the Grappendorfs have not been precluded a remedy in this case in Open Court.

action existing at the time of its enactment." *Id.* (citation omitted). "The legislature thus remains free to abrogate or limit claims that could not have been brought under then-existing law. Claims barred by the doctrine of governmental immunity are an example of this principle." *Id.*

The Grappendorfs do not argue that at some point in time prior to 2002 they could have brought a claim under these facts which has now been abrogated by the district courts application of *Blackner*. Rather, the Grappendorfs rely on their flawed logic that because in their eyes *Blackner* abrogates all claims against government entities the application thereof violates the Open Courts Clause. This is not the case. For example, if Daniel Grappendorf had climbed under the mound, and it fell on him without aid of any natural condition, breaking the strap and killing him, contrary to what the Grappendorfs claim, the natural condition exception would not apply simply because gravity had made the mound fall. This is because it is common sense that a municipality must undertake protecting the public from common concerns and occurrences associated with gravity. *See e.g.*, *Nelson By and Through Stuckman v. Salt Lake City*, 919 P.2d 568, 573 (Utah 1996) (holding that "once an entity undertakes to provide that protection, it is obligated to use reasonable care in providing it.").

Here, the City had not undertaken to provide protection from microburst gusts of wind. *See* [R. at 1046 (purpose of chaining mound was to protect from jumping bikes)]. As is discussed above, a microburst gust of wind can take objects properly

secured to avoid the forces of gravity and turn them into lethal projectiles. Accordingly, as is thoroughly discussed above, the proximate cause from which this accident "arose out of" was the sudden, forceful, and unexpected microburst of wind. Thus, the district court correctly applied *Blackner* and did not abrogate the Grappendorfs of any claim.

Second, the Grappendorfs claim that the definition of "government function" in Utah Code Ann. § 63-30-2(4)(a), that was adopted by the Utah Legislature in 1987 is unconstitutionally overbroad and thus abrogates their right to the Open Courts. The Grappendorfs argue that this Court should apply the *Berry* test found in *Berry By and Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985) as that test was confirmed in *Laney v. Fairview City*, 57 P.3d 1007 (Utah 2002).

This argument places the proverbial cart before the horse. In order for the *Berry* test to apply, the Grappendorfs must prove they were in fact abrogated of a pre-existing claim for wrongful death against the City. They cannot do so, and thus the *Berry* test is inapplicable. The district court recognized this, when stating "[b]ecause there is no finding that the legislature impermissibly abrogated a cause of action, this court will not apply the *Berry* test as directed in *Laney*; the immunity statute must be applied as presently in effect." [R. at 1036].

Claiming they were in fact abrogated of their Open Courts Clause rights, the Grappendorfs now believe that the City's operation of the Manila fields is proprietary, and thus was not a government function entitled to immunity. Prior to 1987 proprietary

functions were not considered government functions. *See Standiford v. Salt Lake City Corp.*, 605 P.2d 1230 (Utah 1980) (holding that proprietary operation of a public golf course was not a "governmental function" within purview of the Utah Governmental Immunity Act). This would mean the Grappendorfs would have had a claim against a proprietary function prior to 1987. However, after 1987 proprietary functions are immune from suit. None of this matters however, as the operation of the Manila Fields is not proprietary and would never had fit within the *Standiford* proprietary context.

Notwithstanding, the Grappendorfs argue, absent any factual support or citation, that the operation of baseball park facility like Manila Field is proprietary like the golf course was in *Standiford*. The Grappendorfs apparently misunderstand that a golf course charges those who use it and the Manila Field complex does not. The Manila Field complex is not proprietary, and there is nothing in the record that indicates otherwise. The Grappendorfs visited the Manila Fields without paying for admission. They did not pay to park. It is undisputed that the Manila Fields are absolutely a non-proprietary public park or public recreational facility. *See* [R. at 0196 (Grappendorfs Second Complaint asserting that City Parks and Recreation employees cared for the mound); R. at 514 (Grappendorfs stating mound was "delivered directly to the Pleasant Grove City Parks Department.")]. Ironically, in *Standiford* this Court held that:

> The most general test of governmental function relates to the nature of the activity. It must be something done or furnished for the general public good, that is, of a "public or governmental character", such as the maintenance and operation of public schools, hospitals, public charities, ***public parks or recreational facilities***.

Id. at 1231 (emphasis added); *see Husband v. Salt Lake City*, 92 Utah 449, 69 P.2d 491, 494 (Utah 1937) (holding that "in the establishment, maintenance, and care of its parks, a city acts in its governmental capacity and is not liable for the negligence of its employees or agents in connection therewith."); *see also* [R. at 1038].

The operation of the Manila Field is clearly not proprietary. Thus, under no circumstances have the Grappendorfs been abrogated of some right to bring a wrongful death claim against the City. Accordingly, this Court need not address the Grappendorfs' arguments as they pertain to applying the *Berry* test as it was applied in *Laney v. Fairview City*, 57 P.3d 1007, 2002 UT 79.

Furthermore, it is doubtful that the *Laney* decision would even apply to this case. For example, *Laney* holds that given an 1987 amendment to the Act, government entities are in fact immune for the negligent acts of all government functions that fit into one of the recognized exceptions found in Utah Code Ann. § 63-30-10. *Laney*, 2002 UT 79 at ¶ 26 (holding "the Act immunizes the City from suit for the negligence alleged by plaintiffs."). The *Laney* Court's majority then goes on hold the following:

> We therefore hold that the 1987 amendment is unconstitutional ***as it applies to municipalities operating electrical power systems***. . . . where a high duty of care is imposed. ***We express no opinion on the constitutionality of the amendment as applied to other municipal activities*** since a lower standard of care may apply and different considerations may be relevant.

Laney v. Fairview City, 2002 UT 79 at ¶ 71 (emphasis added). Time and time again throughout the main opinion of *Laney*, the concurrence, and the dissent, the holding of

Laney is specifically limited to only the operation of a municipal power system.[12]

In talking about the objective of the Utah Legislature in allowing personal injury claims and wrongful death claims against municipalities to expressly be abrogated under the Act, the main Court opinion in *Laney* states "[w]hile that objective is worthy, the legislature swept to broadly when it severely curtailed negligence actions against municipalities operating power systems." *Id.* at ¶ 66. Furthermore, in his concurrence, Justice Russon notes that "[t]he operation of a power plant by a government entity is proprietary. . . . I concur that the 1987 amendment is unconstitutional as it applies municipalities operating electrical power systems . . ." *Id.* at ¶ 81-83.

For four reasons the district court doubted that *Laney* would apply to this case. First, the district court felt that *Laney* was expressly limited to "municipalities operating electrical power systems[.]" [R. at 1043]. Second, *Laney*'s lead opinion was only a plurality analysis. Third, "the immunity sought to be retained in *Laney* was urged based on an exception to immunity quite different from the one presently before the court, and it is not clear how this court must proceed when, as here, 'a lower standard of care

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[12]In a 14 page concurrence and dissent by Justice Wilkins, joined by Justice Durrant, they state that they would uphold the main opinion's first holding that Fairview City is immune from liability. *Id.* at ¶84. However, these Justices expressly disagree with the main opinion and the concurrence in holding that any part, however limited, of Utah Code Ann. § 63-30-2(4)(a) is unconstitutional. *Id.* at ¶ 86 (stating "I would therefore affirm the district court's ruling that Fairview City is immune from suit for the alleged negligence."). All of this language shows what a broad misinterpretation of the holding and language of *Laney* plaintiffs present to this Court.

may apply and different considerations may be relevant.'" [R. at 1042]. Fourth, "decisions subsequent to *Laney* may indicate that the court does not intend *Laney* to have the sweeping effect Plaintiffs ask for here." [R. at 1041].

It is clear that extension of the scope of *Laney* beyond the operation of municipal power plant should never extend to something that was not proprietary in nature like the operation and maintenance of a public park and baseball diamond. Furthermore, the Grappendorfs have presented no factual evidence in the record which indicates that the operation of Manila field was proprietary. For this reason, and those stated above, the Grappendorfs cannot prove that they were in fact abrogated of a pre-existing claim for wrongful death against the City in violation of the Open Courts Clause.

V. The District Court's Application of the Utah Governmental Immunity Act in this Case Does Not Violate the Wrongful Death Cause of Action Guarantee of the Utah Constitution.

Initially, the Grappendorfs did not properly and fully present this argument at the trial court. Notwithstanding, Judge Taylor indicated that Article XVI § 5 "is part of the article on 'Labor.'" [R. at 1045 (footnote 26 of the Memorandum Decision)]. The trial court also noted that "[n]o party has cited any cases demonstrating that this section applies in the present action. As such, this decision addresses only Article I § 11." *Id.* The Grappendorfs made no constitutional arguments at all in their Response in Opposition to Defendant Pleasant Grove City's Motion for Summary Judgment. *See* [R. at 497-518 generally]. The Grappendorfs do briefly address Article XVI § 5 in their

Supplemental Memorandum. *See* [R. at 881-892]. In their Brief of Appellant, the Grappendorfs do present a lengthy discussion of the history of Utah law and wrongful death claims. The Grappendorfs fail to recognize that here, their ***wrongful death*** claim is against a ***government entity***. Thus, case law or statutory law which does not fall within this exact same framework is unpersuasive. Despite their historical analysis, the Grappendorfs cite no Utah statute indicating how Article XVI § 5 specifically applies to wrongful death claims against government entities.[13]

Essentially, the Grappendorfs argue only that similar to their unpersuasive arguments made regarding the Open Courts Clause, their claims against Pleasant Grove has been abrogated by the application of the Utah Government Immunity Act. However, this Court has expressly held that this argument is unpersuasive. *Tiede v. State of Utah*, 915 P.2d 500 (Utah 1996).

In *Tiede*, two felons walked away from a state halfway house, holed up for a week in a cabin, and then made a call to another inmate and informed they would kill the cabin's owners when they arrived. *Id.* at 501. The inmate the felons called told state officials about this call but the state failed to respond to the information. *Id.* As

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[13]The Grappendorfs claim that a statute did create a cause of action for wrongful death prior to the enactment of the Utah Constitution. Brief of Appellant at page 20. However, that statute expressly limits those who may be liable to a person, a company, or a corporation. *Id.* This statute does not create a cause of action in wrongful death against a government entity. *See id.* The "every such case" language emphasized by the Grappendorfs is limited to only a liable person, company, or corporation. *Id.* The statute, from 1874, has no applicability to this case.

represented, the two felons killed the cabins homeowners and kidnaped their kids. *Id.* The heirs of the deceased and the kids brought a civil action "alleging that the State was negligent in failing to apprehend [the felons] and in failing to protect their family members from the inmates. The action further alleges that the State proximately caused the injuries and the two deaths. The district court dismissed the complaint against the State on the basis of governmental immunity." *Id.* at 501-02.

As was discussed previously, in *Tiede*, this Court analyzed section 63-30-10 exceptions to waivers of immunity and found that the district court correctly determined that the state was immune from suit. *Id.* at 502. In analyzing the wrongful death aspects of the *Tiede* case, this Court held that:

> Wrongful death is a civil claim created by statute. *See* Utah Code Ann. § 78-11-7. Nevertheless, its express mention in section 63-30-10[] is unnecessary because, as we have observed, this section already immunizes a governmental entity if a death arises out of [the conduct or condition listed in the section 63-30-10 exceptions].

Id. at 503. The plaintiffs in *Tiede* also claimed that this application of the Act abrogated their constitutional right under Article XVI § 5 of the Utah Constitution.

In analyzing whether this right was abrogated, the Utah Supreme Court held that "the scope of protection afforded by the wrongful death provision is limited to rights of action that existed at the time the provision was adopted." *Id.* at 504. "Sovereign immunity was a settled feature of the common law when Utah became a state and adopted its constitution." *Id.* "At the time the constitution was adopted in 1895, there was no

express constitutional or statutory authority allowing suits for wrongful death against the State." *Id.* "In sum, by retaining governmental immunity from wrongful death suits against the State, section 63-30-10[] does not abrogate any previously existing right of action and therefore does not violate article XVI, section 5." *Id.* Sovereign immunity and governmental immunity both apply to the City. The Grappendorfs do not cite one case that states otherwise. *See* Brief of Appellant, generally. Nor do they cite one case that indicates that they had a prior right to assert claim for wrongful death against a government entity. *See id.*

The Grappendorfs claim that the *Tiede* decision was incorrect and that this Court as currently situated should overrule *Tiede*. Brief of Appellant at page 19. This argument is unavailing as *Tiede* was correctly decided and is very sound law. This Court's opinion in *Tiede* has been relied on by this Court since it was decided for the express holding that immunity exists for a government entity against a claim for wrongful death, and that this application of the Act does not violate Article XVI § 5 of the Utah Constitution. *See Tindley v. Salt Lake City School Dist.*, 116 P.3d 295, 305, 2005 UT 30 at ¶ 36 (recognizing *Tiede* in holding that the Act does not abrogate any previously existing right of action and therefore does not violate article XVI, section 5); *Parks v. Utah Transit Authority*, 53 P.3d 473, 477, 2002 UT 55 ¶ 15 (citing *Tiede* for "observing that when the state constitution was adopted, there was no express constitutional or statutory authority allowing suits for wrongful death against the State."). It is clear that

Tiede was correctly decided and that the Grappendorfs have not suffered a violation of Article XVI § 5 of the Utah Constitution as a result of the trial court's application of the natural condition exception to the waiver of government immunity to their claim of wrongful death.

VI. Judge Taylor's Application of the Utah Governmental Immunity Act in this Case Does Not Violate the Petition Clause of the Utah Constitution.

The Grappendorfs argue on appeal that the Utah Governmental Immunity Act, as applied, violated their Petition rights under the Utah Constitution. *See* Brief of Appellant at pages 4, 23-24. Initially, this argument was not made in pleading format to the trial court. *See* [R. 0881-0892]. The Grappendorfs did however raise this issue at oral argument on the City's Motion for Summary Judgment. *See* [R. 1150 at secondary pages 13 and 29]. Notwithstanding, this argument is misplaced.

As stated in the Appellant's Brief, the Petition Clause of the Utah Constitution assures that "[a]ll men have the inherent and inalienable right to . . . petition for redress of grievances . . . ." Brief of Appellant at page 23 (citing Utah Const. Art. I, § 1). Appellants' Brief admits that a petition is a formal written request to a court, or in other words, a Complaint. *See id.* In the Grappendorfs own words the Petition Clause assures that all citizens of Utah are allowed to file a complaint in the court system. *See id.* The Grappendorfs cite to two cases for support, but these cases both indicate that the filing of a complaint essentially satisfies the Petition Clause. *See Kish v. Wright*, 562 P.2d 625 (Utah 1977) (holding that "civil rights actions arising under Sec. 1983 of the

United States Code can be properly brought within the jurisdiction of this state."). In other words the *Kish* court only held that a state court must entertain jurisdiction over a section 1983 civil rights case if such a complaint is filed in state court. *Id.*

Furthermore, the Grappendorfs admit that in the case of *In re Anderson*, 82 P.3d 1134, 2004 UT 7 ¶ 68 (Utah 2004), this Court stated that filing a civil complaint was tantamount to exercising ones right to petition for the redress of grievances. Here, it is undisputed that the Grappendorfs were allowed to file their civil complaint. Thus, the Grappendorfs did petition the trial court to redress their grievances. The trial court indicated at oral argument that the Grappendorfs had been allowed to petition for their grievances when it said the Petition Clause guarantees only that: "you can sue everybody" and "[t]hat's why I come to work everyday." [R. 1150 at pages 13 and 29]. In other words, filing your complaint and getting your claim properly before the court satisfies the Petition Clause. The Petition Clause does not guarantee a right to an absolute outcome.

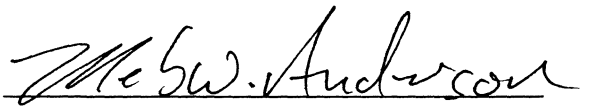
The Grappendorfs have brought their claims against Pleasant Grove and other defendants who have now been dismissed with prejudice. The district court has ruled on those claims or they have been settled and those defendants dismissed with prejudice. *See* Brief of Appellant at page 6-8. The Petition Clause goes no further than to say that all persons have the right to petition the court to redress their grievances, which in this case the Plaintiffs have clearly done. Accordingly, their was no violation of the Petition Clause in this case under any scenario.

CONCLUSION

For the reasons stated above, the City respectfully requests that this Court affirm Judge Taylor's grant of governmental immunity to Pleasant Grove in this case.

DATED this 16th day of October, 2006.

STIRBA & ASSOCIATES



PETER STIRBA
MEB W. ANDERSON
Attorneys for Pleasant Grove City

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2006, I caused to be served a true copy of **BRIEF OF APPELLEE** by the method indicated below, to the following:

Edward Moriarity
Bradley Booke
Robert D. Strieper
MORIARITY, BADARUDDIN, & BOOKE
341 South Main Street, Suite 406
Salt Lake City, Utah 84111

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
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